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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2363 OF 2005

Mohd. Rizwan Mohd. Isaq @ Laddowala,)
aged 23 years, Room No.5, Raza Gali,)
Railway Line, Kurla (E), Mumbai,)
presently lodged at Arthur Road)
Mumbai Central Prison.) ... Petitioner/
(Orig. Accused 5)

Versus

1. The State of Maharashtra)
(At the instance of DCB, CID))

2. The Chief Secretary)
of the State of Maharashtra.) ... Respondents/
(Complainants)

ALONG WITH

CRIMINAL APPEAL NO.789 OF 2005

Mohd. Hassan Mohd. Anas @ Hassan)
Batterywala, age 46 years, Sunder)
Baug Lane, Sanjay Nagar, Hill No.3,)
Kurla (W), Mumbai - 70.) ... Appellant
(Orig. Accused 5)

Versus

1. The State of Maharashtra)

2. The Chief Home Secretary)
of the State of Maharashtra.) ... Respondents/
(Complainants)

Mr. S.R. Chitnis, senior counsel with Mr. S.A. Pachola, Mr. Mirza Yadullah and Mr. Sharif Shaikh, advocates for the petitioner/appellant.

Mr. S.R. Borulkar, Public Prosecutor with Mr. D.S. Mhaispurkar, A.P.P. and Ms. P.H. Kantharia, A.P.P. for the State.

CORAM: SMT. RANJANA DESAI &
ANOOP V. MOHTA, JJ.

DATED: 24TH OCTOBER 2005.

ORAL JUDGMENT : (Per Smt. Ranjana Desai, J.)

1. Rule in Criminal Writ Petition No.2363 of 2005 and Criminal Appeal No.789 of 2005 is admitted. The respondents waive service. By consent of the parties, taken up for hearing forthwith.

2. Criminal Writ Petition No.2363 of 2005 and Criminal Appeal No.789 of 2005 involve common questions of law and facts and, therefore, they can be disposed of by a common judgment.

3. The petitioner in Criminal Writ Petition No.2363 of 2005 is original accused 5 and the appellant in Criminal Appeal No.789 of 2005 is original accused 4 in POTA Special Case No.1 of 2004 which is being tried by the Special Court constituted under the Prevention of Terrorism Act, 2002 (for short, "the POTA 2002"). For convenience, it would be better to refer to the petitioner in the writ petition and the appellant in the appeal as per their status in the special case. The accused are being tried along with other accused for offences under sections 3, 4, 5 and 20 of the POTA 2002 and also under the Explosive Substance Act, Arms Act, Damage to Public Property Act and the Indian Penal Code (for short, "the IPC"). According to the accused, during the pendency of this case, the Central Pota Review Committee (for convenience, "the said Committee") directed them to represent their case before it in person

or through their advocate. The accused represented themselves before the said Committee through their advocate. On 14/6/2005, the said Committee communicated its order to the Chief Secretary of the Government of Maharashtra and to the accused. It is stated in this order that after examining the available material on record and after hearing the counsel for the parties, the said Committee had passed order dated 10/5/2005 wherein it has directed the State of Maharashtra to proceed in accordance with clause (a) of sub-section 3 of section 2 of the Prevention of Terrorism (Repeal) Act, 2004 (for short, "the Repeal Act") in respect of accused 4 and 5.

A copy of the order was also annexed to the said order.

4. Misc. Application No.44 of 2005 and Misc. Application No.42 of 2005 were preferred by accused 4 and 5 respectively in the Special Court praying that they may be discharged from the said case. The Special Court by its order dated 11/8/2005 rejected the said applications. The learned judge took a view that the said Committee is a creation of the legislature to prevent continuance of vindictive prosecutions against the accused and its object is not to stultify the pending trial where charges are framed by a court of law after considering the material. It is further observed that ultimately it is for the public prosecutor to apply his mind independently to the case. Even if the State Government is willing to withdraw the case, it is the public prosecutor who has to take the ultimate decision as per the provisions of the

Criminal Procedure Code (for short, "the Code") and it is for the Special Court to decide whether the plea of the public prosecutor to withdraw the case is acceptable or not. The learned judge was of the opinion that the direction given by the said Committee cannot create a right in favour of the accused. According to the learned judge, the application based on the report of the said Committee cannot create a right in favour of the accused and the application based on the report of the said Committee is not maintainable. The learned judge observed that the accused were not entitled to seek discharge as the charges are framed long back and witnesses are being examined. This order is challenged before us by accused 4 and 5.

5. Accused 4 has preferred the criminal appeal under section 34 of the POTA 2002 and has prayed that he may be discharged from the charges in the special case in the light of the order of the said Committee. Accused 5 has preferred the writ petition and has, inter alia, prayed that in the light of the order of the said Committee, the respondents may be directed to withdraw the charges under POTA 2002 levelled against him.

6. We have heard, at considerable length, Mr. Chitnis, the learned senior counsel appearing for accused 4 and 5. Mr. Chitnis contended that the Chief Secretary to the Government of Maharashtra has been made a party in the writ petition as well as in the criminal appeal but he

has not filed any affidavit in reply. He submitted that this fact is of great relevance and inasmuch as the reply is not filed, this court should draw an adverse inference. Mr. Chitnis gave us a brief history of the POTA 2002, the subsequent amendments made to it and its repeal. He pointed out that the POTA 2002 (Act No.15 of 2003) came into force on 24/10/2001. Under section 60 thereof, there was a provision for Review Committee. By the Prevention of Terrorism (Amendment) Act, 2003 (Act No.4 of 2004), the POTA 2002 was amended with effect from 27/10/2003. By this amendment, sub-sections 4, 5 and 6 were added to section 60. Sub-section 7 was added on 2/1/2004. The parliament then enacted the Repeal Act. By this Repeal Act, the POTA 2002 was repealed but sub-section 3 of section 2 thereof stated that notwithstanding the repeal of section 60 of the principal Act, the Review Committee constituted by the Central Government under sub-section (1) of that section, whether or not an application under sub-section (4) of that section has been made, shall review all cases registered under the principal Act as to whether there is a prima facie case for proceeding against the accused thereunder and such review shall be completed within a period of one year from the commencement of this Act and where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused, then (a) in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn; and (b) in cases in which investigations are pending, the

investigations shall be closed forthwith, with effect from the date of issuance of the direction by such Review Committee in this regard. Mr. Chitnis contended that POTA 2002 was repealed because its provisions were grossly misused. Even the insertion of sub-sections 4, 5, 6 and 7 to section 60 by amendment did not prevent the misuse of POTA 2002 and, therefore, the Repeal Act provided for sub-section 3 of section 2. Mr. Chitnis contended that this provision is distinct from the repealed sub-sections 4 to 7 of section 60 of the POTA 2002. Mr. Chitnis heavily relied on the statement of objects and reasons of the Repeal Act, to which we shall shortly advert. Mr. Chitnis contended that it is important to note that the Repeal Act has repealed section 60 of the principal Act but has saved the said Committee constituted by the Central Government under sub-section 1 of section 60 and this has to be read in the context of the statement of objects and reasons of the Repeal Act. He further submitted that the legislature in its wisdom thought that this is the only provision which can stop misuse of the principal Act. The said Committee has necessarily to review all cases registered under the POTA 2002 and in case it is of the opinion that there is no case, then consequences mentioned in sub-clauses (a) and (b) must follow and section 321 of the Code does not come in the picture at all. Neither the public prosecutor nor the court has any role to play. If the said Committee finds that prima facie there is no case then from the date it issues the

order, the cases in which cognizance has been taken by the court shall be deemed to have been withdrawn and in cases in which investigations are pending the investigations shall be closed forthwith. The learned counsel urged that the public prosecutor cannot defeat the intention of the legislature.

7. Mr. Chitnis contended that the judgment of the Madras High Court dated 4/2/2004 in a group of writ petitions being Writ Petition Nos.1238 to 1240 of 2004 and Writ Petition Nos.1297 to 1299 of 2004 (for short, "Madras judgment") where constitutionality of sub-sections 4, 5, 6 and 7 of section 60 was questioned and where the Madras High Court has taken a view that the direction given under sub-section 7 of section 60 will have to be understood only in the context of section 321 of the Code; that the said direction is not binding on the public prosecutor and that even if an application under section 321 of the Code is made, the ultimate arbiter is the Special Court, has no application to the present case because the Repeal Act came into force thereafter i.e. on 24/9/2004. Mr. Chitnis pointed out that even the Supreme Court judgment confirming Madras judgment is dated 8/3/2004 i.e. prior to the coming into force of the Repeal Act and, therefore, sub-section 3(a) and (b) of section 2 of the Repeal Act were neither before the Madras High Court nor before the Supreme Court and, therefore, those judgments would not be applicable to the present case.

8. Mr. Chitnis contended that the judgment of the Gujarat High Court (for short, "Gujarat judgment") in Special Civil Application No.1103 of 2005 with Special Civil Application No.1105 of 2005 is dated 13/4/2005 and is undoubtedly delivered after the Repeal Act came into force but the Gujarat High Court has not considered the scheme of sub-sections 3(a) and (b) of section 2 of the Repeal Act and has read section 321 of the Code in such a manner as to defeat the aims and objectives of the Repeal Act. He submitted that if the provisions of the Repeal Act are so interpreted, it would not attain the object of prevention of misuse of the POTA 2002.

9. Mr. Chitnis submitted that it is important to note that in the special leave petition filed against the Gujarat judgment, the Supreme Court has granted leave and by way of interim order has allowed the said Committee to give its report pending disposal of the appeals. However, it has directed that no further action will be taken thereon by the prosecutor and the courts shall not proceed with the prosecutions of persons exonerated by the said Committee till further orders of the Supreme Court. Mr. Chitnis contended that the fact that the Supreme Court has used the words "prosecutions of persons exonerated" speaks volumes.

10. Mr. Chitnis then contended that the words "deemed to have been withdrawn" found in sub-section 3(a) of

section 2 of the Repeal Act are of great importance. He submitted that under section 50 of the POTA 2002, sanction to prosecute has to be granted by the Central Government or the State Government as the case may be. The effect of sub-section 3(a) of section 2 is that even sanction is deemed to have been withdrawn. Mr. Chitnis took us to the meaning of the word "deemed" as found in the Law Lexicon. He pointed out that the true synonym for the word "deemed" is "judged". Whenever the word "deemed" is used in a statute in relation to a person or a thing, it implies that the legislature after due consideration exercised its judgment in conferring that status or attribute to a person or a thing. He submitted that therefore the legislature wanted pending cases to be conferred status of withdrawn cases. He submitted that the word "cognizance" was not there in section 60. It has been added by the Repeal Act in sub-section 3(a) of section 2. The learned counsel submitted that considering the aims and objectives of the Repeal Act, this court must hold that section 321 of the Code cannot override sub-sections 3(a) and (b) of section 2 of the Repeal Act. Mr. Chitnis has also submitted his written submissions and we have considered the same.

11. As against this, Mr. Borulkar, the learned public prosecutor submitted that section 3 of the Repeal Act and sub-section 7 of section 60 of the POTA 2002 are in pari materia. Sub-section 7 is also introduced to prevent misuse of POTA 2002. It has a deeming provision. He

submitted that therefore the Madras judgment which has interpreted sub-section 7 of section 60 will cover the present case.

12. Mr. Borulkar further submitted that the said Committee is a part of the executive. The said Committee's role ends when it submits its report and when application made under section 321 of the Code is placed before the court. It is for the public prosecutor to take a decision whether to withdraw the prosecution or not and the Special Court is the ultimate arbiter in the matter. Mr. Borulkar pointed out that the Supreme Court has affirmed the view of the Madras High Court that section 321 of the Code will override recommendations of the said Committee while dismissing the SLP filed against the Madras judgment. He submitted that to meet the situation created by the repeal of the POTA 2002, sub-section 3 of section 2 was enacted. He pointed out that the Gujarat judgment takes into consideration the provisions of the Repeal Act. He contended that the Gujarat High Court has, after considering sub-section 3 of section 2 of the Repeal Act, concurred with the Madras High Court and hence this court should take the same view. He drew our attention to the judgment of the Supreme Court in **R.M. Tewari v. State (NCT of Delhi) and Ors., (1996) 2 SCC 610** where while considering the provisions of the Terrorist & Disruptive Activities Act, 1987 (for short, "the TADA"), the Supreme Court has held that it is for the public prosecutor to make an

application for withdrawal under section 321 of the Code. He also relied on the judgment of the Supreme Court in **Sheonandan Paswan v. State of Bihar & Ors., (1987) 1 SCC 288** where the role of the public prosecutor is highlighted by the Supreme Court. The learned public prosecutor urged that in view of the above, the accused cannot be discharged on the recommendations of the said Committee unless the prosecutor deems it fit to make an application under section 321 of the Code for withdrawal of the prosecution.

13. We have given anxious considerations to the submissions advanced by both sides.

14. While considering the constitutional validity of the TADA which also aimed at containing terrorism in **Kartar Singh v. State of Punjab, (1994) 3 SCC 569**, the Supreme Court emphasised the need to have a screening committee to prevent abuse of stringent provisions of TADA. The POTA 2002 was enacted by the legislature for the prevention of, and for dealing with, terrorist activities and for matters connected therewith. It appears that in the light of observations of the Supreme Court in **Kartar Singh's case (supra)** provision for screening committee was made under section 60 of the POTA 2002. Sections 19, 40 and 46 of POTA 2002 related to the Review Committee. On 27/10/2003, the Prevention of Terrorism (Amendment) Act, 2003 (Act No.4 of 2004) was enacted. Sections 4, 5 and 6 were added to section 60 of the POTA 2002. Section

7 was added on 2/1/2004. It would be advantageous to reproduce section 60 in its entirety.

"60. Review Committees. - (1) The Central Government and each State Government shall, whenever necessary, constitute one or more Review Committees for the purposes of this Act.

(2) Every such Committee shall consist of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed.

(3) A Chairperson of the Committee shall be a person who is, or has been, a Judge of a High Court, who shall be appointed by the Central Government, or as the case may be, the State Government, so however, that the concurrence of the Chief Justice of the High Court shall be obtained in the case of a sitting Judge:

(4) Without prejudice to the other provisions of this Act, any Review Committee constituted under sub-section (1) shall, on an application by any aggrieved person, review whether there is a prima facie case for proceeding against the

accused under this Act and issue directions accordingly.

(5) Any direction issued under sub-section (4) -

(i) by the Review Committee constituted by the Central Government, shall be binding on the Central Government, the State Government and the police officer investigating the offence; and

(ii) by the Review Committee constituted by the State Government, shall be binding on the State Government and the police officer investigating the offence.

(6) Where the reviews under sub-section (4) relating to the same offence under this act, have been made by a Review Committee constituted by the Central Government and a Review Committee constituted by the State Government, under sub-section (1), any direction issued by the Review Committee constituted by the Central Government shall prevail.

(7) Where any Review Committee constituted under sub-section (1) is of opinion that

there is no prima facie case for proceeding against the accused and issues directions under sub-section (4), then, the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction."

15. It appears that because of large scale misuse of the POTA 2002, by the Repeal Act, it was repealed. The relevant portions of the statement of objects and reasons of the Repeal Act may be quoted as Mr. Chitnis has placed heavy reliance on it.

"2. There have been allegations of gross misuse of the provisions of the Act by some State Governments. Views have been expressed that provisions of the Act were misused in cases where they should not have been invoked. It has also been observed in various quarters that the Act has, failed to serve its intended purpose and as a result, there have been persistent demands that this Act should be repealed.

3. The Government has been concerned with the manner in which provisions of the Act were grossly misused in the past two years. It was, therefore, felt necessary to repeal the Act. As Parliament was not in session,

the Prevention of Terrorism (Repeal) Ordinance, 2004 was promulgated on 21-9-2004. The Ordinance empowers the Central Review Committee to review all cases pending in the courts or at various stages of investigation and complete the review within the period of one year from the date of repeal of the Act and to give its directions. Whenever, in the opinion of the Central Review Committee no prima facie case is made out either in respect of cases pending in the courts, or under investigation, such cases shall be deemed to have been withdrawn and investigation closed, as the case may be."

16. Sub-section 3 of section 2 of the Repeal Act is material and, hence, it may be quoted.

"2.(1) x x x

(2) x x x

(3) Notwithstanding the repeal of section 60 of the principal Act, the Review Committee constituted by the Central Government under sub-section (1) of that section, whether or not an application under sub-section (4) of that section has

been made, shall review all cases registered under the principal Act as to whether there is a prima facie case for proceeding against the accused thereunder and such review shall be completed within a period of one year from the commencement of this Act and where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused,

then, -

(a) in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn; and

(b) in cases in which investigations are pending, the investigations shall be closed forthwith,

with effect from the date of issuance of the direction by such Review Committee in this regard."

17. Sub-section 5 of section 2 thereof reads as under :

"2.(1) x x x

(2) x x x

(3) x x x

(4) x x x

(5) The Central Government may constitute more Review Committees, as it may consider necessary, for completing the review within the period specified in sub-section (3)."

18. There can be no doubt that the Repeal Act seeks to prevent and stop misuse of the POTA 2002 by entrusting to the said Committee the important task of reviewing all cases registered under the POTA 2002 whether an application is made to it or not. It has to undertake this task suo motu. The review has to be completed within one year and if the said Committee comes to a conclusion that there is no prima facie case against the accused in cases in which cognizance has been taken by the court, the said cases shall be deemed to have been withdrawn and in cases in which investigations are pending, the investigations shall be closed forthwith with effect from the date of issuance of the direction of the said Committee in this regard. This is the gist of sub-sections 3(a) and (b) of section 2 of the Repeal Act. The present case falls under sub-section 3(a) of section 2 of the Repeal Act. Sub-section 5 of section 2 of the Repeal Act permits the Central Government to constitute more Review Committees, as it may consider necessary, for completing the review within the period specified in

sub-section (3) i.e. one year. Therefore, the intention of the legislature is very clear that misuse of the POTA 2002 must be stopped.

19. It appears to us that sub-section 3 of section 2 was enacted by the Repeal Act to take care of the situation created by the repeal of POTA 2002 particularly section 60 thereof. Sub-section 3 of section 2 took into account two types of cases i.e. cases where investigations are in progress and cases in which cognizance has been taken by the court. All that sub-section 3 of section 2 did was to entrust suo motu powers to the said Committee to review all cases under the POTA 2002. Whereas in sub-section 7 of section 60, the words "pending proceedings" were used sub-section 3 of section 2 has clarified that pending proceedings would include cases in which cognizance has been taken by the court and the cases in which investigations are pending. Sub-section 7 of section 60 also has the words "deemed to have been withdrawn". Both sub-section 3 of section 2 of the Repeal Act and sub-sections 4 to 7 inserted by the Prevention of Terrorism (Amendment) Act, 2003 seek to prevent misuse of the POTA 2002. Therefore, we do not find that there is any material difference between the two provisions and, therefore, in our opinion, Mr. Chitnis is not right when he says that the Madras judgment will not be applicable to the present case because Madras High Court was not considering sub-section 3 of section 2 of the Repeal Act.

20. In the case before the Madras High Court, constitutionality of sub-sections 4, 5, 6 and 7 of section 60 was challenged. It was argued that the proceedings before the said Committee tend to interfere in the judicial process and is an encroachment on the judicial power of the State. The Madras High Court observed that the exercise of the power by the said Committee cannot be termed as scuttling the judicial process. The accused in this case have no quarrel with this proposition, but they take exception to the further observations of the Madras High Court that if the said Committee comes to the conclusion that the case is fit to be withdrawn from prosecution under the POTA 2002, it can address the State Government, which in turn has to instruct the public prosecutor to invoke section 321 of the Code and that the role of the said Committee is only limited that far and no further and there is no scope to interpret the impugned provisions as automatically entailing in withdrawal of proceeding de hors section 321 of the Code. The Madras High Court has also observed that the direction of the said Committee is not binding on the public prosecutor as under section 321 of the Code, he has to formulate his opinion on his own independent application of mind and even if an application under section 321 of the Code is filed, the ultimate arbiter is the Special Court which has to consider the matter taking the overall situation by

giving due consideration to the opinion of the said Committee.

21. It is pertinent to note that the special leave petition filed against the Madras judgment was dismissed by the Supreme Court on 9/3/2004 by a speaking order. The Supreme Court has referred to its judgment in **R.M. Tewari's case (supra)** and held that the High Court has correctly held that the directions given by the said Committee could only be subject to section 321 of the Code.

22. Since we are of the opinion that there is no material difference between sub-section 7 of section 60 of the POTA 2002 and sub-section 3 of section 2 of the Repeal Act, the present case would be covered by the judgment of the Supreme Court arising out of the Madras judgment. We also have the Gujarat judgment where the Gujarat High Court has considered the provisions of the Repeal Act and taken the same view.

23. Before the Gujarat High Court, the relations of those killed in the Godhra incident filed petitions to strike down sections 3 and 5 of the Repeal Act. Similar contentions were raised before the Gujarat High Court. The Gujarat High Court considered the relevant provisions of the POTA 2002, the Repeal Act, the Madras judgment and the Supreme Court's judgment arising therefrom and observed that when the parliament enacted the Repeal Act,

it was aware of the fact that the Division Bench of the Madras High Court had made sub-section 7 of section 60 of the POTA 2002 subject to section 321 of the Code and the view of the Madras High Court had been expressly approved by the Supreme Court and yet it did not choose to exclude the applicability of section 321 of the Code from the scheme of section 2(3) of the Repeal Act. The Gujarat High Court further observed that rather the language of sub-section 7 read with section 4 of the POTA 2002 was substantially retained by the Repeal Act. The Gujarat High Court concluded that therefore the parliament will be deemed to have accepted the interpretation placed by the Madras High Court on the provisions of sub-sections 4 to 7 of section 60 of the POTA 2002 which was approved by the Supreme Court. The Gujarat High Court further concluded that keeping in view the ratio of the judgment of the Madras High Court which has been approved by the Supreme Court, the provisions of the Repeal Act impugned before it must be read in conjunction with section 321 of the Code. The Gujarat High Court then directed the said Committee to forward its opinion to the public prosecutor. The Gujarat High Court further directed that the public prosecutor shall then present appropriate application under section 321 of the Code before the Special Court and the Special Court was directed to dispose of such applications as early as possible keeping in view observations of the Supreme Court in **R.M. Tewari's case (supra)**.

24. We respectfully concur with the Gujarat judgment. Mr. Chitnis wants us to hold that once the said Committee comes to a conclusion that there is no prima facie case against the accused, the case pending against the accused, the cognizance of which is taken by the court, automatically ends. The public prosecutor or the court has no role to play. The State must then ask the public prosecutor to submit application for withdrawal of the case in the court and the court must pass order withdrawing the prosecution. According to Mr. Chitnis, the public prosecutor has no say. Not only that but even the court is robbed of its discretion, because that is the intention of the parliament made evident through the Repeal Act.

25. By so reading sub-section 3 of section 2 of the Repeal Act, we would be rendering section 321 of the Code nugatory. We are of the opinion that we would then be reducing the public prosecutor appointed under section 28 of the POTA 2002 to a puppet and we would rob the court of its powers to veto a wrong withdrawal of prosecution. We feel that in the criminal justice administration system, in which we exist, in matters of withdrawal of cases of which cognizance has been taken by the court, the court must have the last word. Under the Code section 321 is the only channel through which a prosecution can be withdrawn. There is no other provision for withdrawal and if the correct procedure is to be followed then under section 321 of the Code, the

public prosecutor has a major role to play. The public prosecutor has always played a vital role in the criminal justice administration system. No doubt, he conducts the prosecution on behalf of the State but he is expected to be independent. He must have a will of his own and must be in a position to resist any pressure exerted on him. In several judgments, the Supreme Court has so described the role of the public prosecutor. In **Subhash Chander v. State, (1980) 2 SCC 155**, the Supreme Court has observed as under :

> "The functionary clothed by the Code with the power to withdraw from the prosecution is the Public Prosecutor. The public prosecutor is not the executive, nor a flunkey of political power. Invested by the statute with a discretion to withdraw or not to withdraw, it is for him to apply an independent mind and exercise his discretion. In doing so, he acts as a limb of the judicative process, not as an extension of the executive."

26. In this case, the Supreme Court clarified the role of the court also. The Supreme Court observed that the court has to consider whether a prosecution can be withdrawn on grounds of policy or reasons of public interest. In **Sheonandan Paswan's case (supra)**, the Supreme Court considered all the relevant judgments and

reiterated the same view and held that the power of the prosecutor to withdraw from prosecution under section 321 of the Code can only be exercised with the consent of the court so that the court can ensure that the power is not abused or misused or exercised in an arbitrary or fanciful manner. Therefore, there can be no withdrawal without the consent of the court. We do not see anything in the provisions of the Repeal Act which has given a go by to this settled position in law.

27. We are fortified in our view by the authoritative pronouncement of the Supreme Court on the point in issue in **R.M. Tewari's case (supra)**. In that case, the Committee under the TADA reviewed the prosecution under the TADA and Government of Delhi conveyed its approval to the Director of Prosecution, Delhi, for deletion of the charges under the TADA. The public prosecutor filed application in the designated court for withdrawal of charges under the TADA on the ground of recommendations of the High Power Committee. The designated court dismissed the application taking the view that administrative decisions cannot interfere with the working of the judicial system.

28. The Supreme Court considered the scope of section 321 of the Code. It referred to various judgments including the judgment in **Sheonandan Paswan's case (supra)**. The Supreme Court observed that the designated court was right in taking the view that withdrawal from

prosecution is not to be permitted mechanically by the court on an application for the purpose made by the public prosecutor and it is equally clear that the public prosecutor has also not to act mechanically in the discharge of his statutory function under section 321 of the Code on such a recommendation being made by the said Committee and it is the duty of the public prosecutor to satisfy himself that it is a fit case for withdrawal from prosecution before he seeks consent of the court for that purpose in accordance with the settled principles and then to satisfy the designated court of the existence of the ground which permits withdrawal from prosecution under section 321 of the Code and on such application being made, the designated court would decide the same in accordance with law.

29. We are, therefore, of the opinion that sub-section 3 of section 2 of the Repeal Act does not override section 321 of the Code. The Special Court is right in taking that view and we do not think that the Special Court's order calls for any interference from us. We are of the opinion that on the basis of the said Committee's report, the accused cannot be discharged on the application of the accused. It is pertinent to note that the charge-sheet is filed and evidence is being led in the case. Needless to say that if there is no evidence against the accused, they would be acquitted.

30. We have already quoted the order passed by the Supreme Court on the special leave petition filed challenging the Gujarat judgment. Mr. Chitnis led stress on the fact that the Supreme Court has permitted the said Committee to give its report. However, the Supreme Court directed that no further action can be taken and the court shall not proceed with the prosecutions of the persons exonerated by the said Committee till further order of the Supreme Court. Mr. Chitnis contended that the Gujarat High Court was basically dealing with section 321 of the Code and, therefore, the order passed by the Supreme Court is of great significance and it may be taken into consideration. We are not impressed by the submission of Mr. Chitnis. Whereas in the case before the Gujarat High Court, the said Committee was allowed to give its report, in the instant case the said Committee has given a direction to the State to proceed in accordance with sub-section 3(a) of section 2 of the Repeal Act. Moreover, we have already taken a view that there is no material difference between sub-section 3 of section 2 of the Repeal Act and sub-section 7 of section 60 of the POTA 2002. We have observed that therefore the judgment of the Madras High Court applies to this case also and the special leave petition filed challenging the Madras judgment has been dismissed by the Supreme Court by a reasoned order categorically stating that the High Court has correctly held that the directions given by the said Committee could only be subject to section 321 of the

Code. That reasoned order of the Supreme Court is, applicable to this case.

31. So far as the contention that the Chief Secretary has not filed a reply is concerned, we are not inclined to draw adverse inference against the respondents because we are basically concerned with a question of law.

32. Having considered all aspects of the matter in depth, we find that there is no substance in the appeal and the writ petition. We have already held that sub-section 3(a) of section 2 of the Repeal Act will have to be read in conjunction with section 321 of the Code and, therefore, it is for the public prosecutor to apply his mind whether to withdraw from prosecution or not and the court will be the final arbiter. It appears that before the Special Court, applications have been made by the accused. In the instant case, the said Committee has given a direction to the State to proceed in accordance with sub-section 3(a) of section 2 of the Repeal Act. The State will, therefore, have to follow the correct procedure. It appears that the report of the said Committee is already placed before the Special Court. Hence, there is no question of the public prosecutor placing it before the Special Court. However, the public prosecutor will make an appropriate application before the Special Court under section 321 of the Code stating his opinion therein and the Special Court will be the final arbiter in the matter.

33. We expect all concerned to act expeditiously. The appeal and the writ petition are disposed of in the aforestated terms.

34. At this stage, Mr. Chitnis says that since an important question of law is involved in the instant appeal and the writ petition and since in the special leave petition filed against the Gujarat judgment, leave has been granted by the Supreme Court and interim order is also passed, this court should grant certificate to the accused under Article 134-C of the Constitution of India. In the view that we have taken that the present case is covered by the reasoned judgment of the Supreme Court, in our opinion, this is not a case where the certificate should be granted. Hence, the prayer for certificate is rejected.

(SMT. RANJANA DESAI, J.)

(ANOOP V. MOHTA, J.)